Brigadier Industries *and* Wenford B. Ewings *and* Sammy L. White. Cases 10-CA-17383 and 10-CA-17376

26 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 8 November 1982 Administrative Law Judge Howard I. Grossman issued the attached Decision in this proceeding.[1] Thereafter, the Respondent filed exceptions and a supporting brief, and the Intervenor[2] filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision and Erratum in light of the exceptions and briefs and has decided to affirm the rulings, findings,[3] and conclusions[4] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Brigadier Industries, Sylvester, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(d) and reletter the subsequent paragraph accordingly:

"(d) Discharging or otherwise discriminating against employees because of their interest in or activity on behalf of Amalgamated Clothing and Textile Workers Union, or any other labor organization."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT engage in surveillance of our employees' union activities.

WE WILL NOT threaten our employees with loss of their jobs if they give evidence to an agent of the National Labor Relations Board.

WE WILL NOT coercively interrogate our employees concerning their union sympathies.

WE WILL NOT discharge or otherwise discriminate against employees because of their interest in or activity on behalf of Amalgamated Clothing and Textile Workers Union, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

---

[1] On 9 December 1982 the Administrative Law Judge amended his Decision by issuing an Erratum.

[2] Amalgamated Clothing and Textile Workers Union.

[3] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. Neither do we find merit in the Respondent's contention that, because the Administrative Law Judge generally discredited the Respondent's witnesses and credited the General Counsel's witnesses, his credibility resolutions are erroneous or attended by bias or prejudice. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656 (1949). Indeed, upon careful examination of the Administrative Law Judge's Decision and the entire record in this proceeding, we are satisfied that the Respondent was accorded a full and fair hearing and that its allegations of bias and prejudice are without merit.

In the first paragraph of sec. B,(1),(c), the last paragraph of sec. B,(2), the fourth Conclusion of Law, and the second paragraph of "The Remedy" section of the Administrative Law Judge's Decision, substitute the word "July" for the word "April" to reflect correctly the month in which the events there referred to took place.

[4] In concluding that the Respondent unlawfully discharged employees Ewings and White, Chairman Dotson disavows any reliance on the fact that they were discharged only 1 week prior to the Board-conducted election. Rather, he relies solely on the fact that the Respondent disciplined these known union adherents more harshly than it had others for the offense allegedly committed, demonstrating, by such disparate treatment, that they were discharged because of their active support for the Union.

However, Chairman Dotson would not find that either Foreman Gunter or Production Manager Howell engaged in unlawful conduct in asking employees Ewings and White, respectively, what they thought about the Union. In his view, such inquiry is not unlawful unless it is "coercive in light of all the surrounding circumstances." *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 492 (2d Cir. 1975); *Burns Electronic Security Services v. NLRB*, 624 F.2d 403 (2d Cir. 1980). See *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), and cases cited therein.

Member Jenkins agrees with the Administrative Law Judge that the Respondent's asserted reason for the discharges of Ewings and White was a pretext. However, because the asserted reason was a pretext, Member Jenkins would not apply the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980). In Member Jenkins' view, that analysis is applicable only in cases involving mixed motives, where a genuine lawful reason and a genuine unlawful reason exist, and it is misleading to apply it in cases like this one, where only an unlawful reason exists.

WE WILL offer Wenford B. Ewings and Sammy L. White full and immediate reinstatement to their former positions, or, if either such position no longer exists, to a substantially equivalent position, without prejudice to their seniority and other rights and privileges, discharging if necessary any employee hired to replace either of them.

WE WILL make Wenford B. Ewings and Sammy L. White whole for any loss of earnings either of them may have suffered, with interest, because we discharged them.

WE WILL expunge from our personnel records, or other files, of Wenford B. Ewings and Sammy L. White, any reference to their unlawful discharges and notify them in writing that this action has been taken and that evidence of their unlawful discharges will not be used as a basis for further personnel actions against them.

BRIGADIER INDUSTRIES

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge: The charge in Case 10-CA-17376 was filed on September 1, 1981,[1] by Sammy L. White (herein White), and the charge in Case 10-CA-17383 was filed on September 2 by Wenford Bernard Ewings (herein Ewings). The complaint issued on October 19 and, as amended at the hearing, alleges that Brigadier Industries (herein Respondent) interrogated its employees concerning their union activities, engaged in surveillance of those activities, and threatened employees with discharge if they gave evidence in a Board proceeding, all in violation of Section 8(a)(1) of the National Labor Relations Act (herein the Act). The complaint also alleges that Respondent discharged White and Ewings because of their union activities, in violation of Section 8(a)(3) and (1) of the Act.

Amalgamated Clothing and Textile Workers Union (herein the Union or the Intervenor) filed a motion to intervene on May 11, 1982, and, on May 24, 1982, said motion was granted by the Regional Director for Region 10. A hearing was held before me on these matters in Sylvester, Georgia, on August 11 and 12, 1982. Upon the entire record, including briefs filed by the General Counsel, Respondent, and the Intervenor, and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a South Carolina corporation with an office and place of business located at Sylvester, Georgia, where it is engaged in the manufacture and sale of mobile homes. During the calendar year preceding issuance of the complaint, a representative period, Respondent sold and shipped from its Sylvester, Georgia, facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that the Intervenor is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Surveillance and Interrogation*

The Union began an organizational campaign in early May, and held several meetings in Sylvester. International Representative Nigel Builder was in charge of the campaign. Employee Sammy White attended four or five meetings. At one of the early ones, the employees were asked to tell how they had been treated at the Company. White said that Foreman Al Gunter[2] had promised him a six-pack of beer if White would "rush" employee Ewings, who was working with White. The next day at the plant, according to White's uncontradicted testimony, Gunter said that he did not know that White was going to repeat everything, and wondered whether White was "going to put it in the paper." Gunter was "kind of down" on White because of this, according to the latter.

The third union meeting was held on the evening of May 19, and like most of them was conducted in the Pink Panther Lounge. Plant Superintendent Wayne Howell[3] and a company salesman were driving around town on the evening of May 19, drinking in the car, according to Howell. White testified that he was late to the meeting, and saw Howell and the salesman driving "up and down the street . . . looking." White then went into the meeting. Union Representative Builder testified that several employees were upset because management representatives were "circling" the building. Builder went outside, and saw Howell and the salesman parked in an automobile near the Casino Lounge, diagonally across the street from the Pink Panther Lounge.

Howell asserted that he saw White and other persons, and stopped near the Casino Lounge. He also testified that he knew that a union meeting was taking place at the Pink Panther Lounge. The Casino Lounge was closed that night. Howell, who is white, stated that both lounges are in Sylvester's black entertainment district, and that he does not normally frequent the Casino Lounge. He did not attempt to conceal himself.

Several of the employees who had attended the meeting went over to talk to Howell. White joined the group, and Howell offered him a drink. According to White,

[1] All dates are in 1981 unless otherwise indicated.

[2] Respondent admits and I find that Gunter was a supervisor within the meaning of Sec. 2(11) of the Act.

[3] Respondent admits and I find that Howell was a supervisor within the meaning of Sec. 2(11) of the Act.

Howell asked him what he thought about the Union. White replied that it was one of the "best things we could do," and the only way the employees were going to "get somewhere [and] get a good raise, other than nickels and dimes . . . ." Howell admitted having the conversation with White. Although he asserted that he could not remember it, he did acknowledge that White mentioned "nickel and dime raises." I credit White's testimony concerning this conversation.

Union Representative Builder started the distribution of union leaflets outside Respondent's facilities, in the middle of May. White participated in this, beginning about the end of the month. He testified that company supervisors watched him do this. In addition, White distributed authorization cards, and continued to attend union meetings. White further averred that Company President Hutcheson addressed a meeting of employees in May, and told them not to vote for the Union. Hutcheson did not ask for questions from the floor, but White, speaking "out of turn," asked Hutcheson what the plant could do for the employees "if the union was so much against us." Hutcheson did not reply, but looked at White for about a minute. I credit White's uncontradicted testimony.

Ewings also distributed leaflets, and offered one to Plant Superintendent Howell. On or about July 7, a week before his discharge, according to Ewings, Foreman Gunter asked him what he thought about the Union. Ewings answered that it was "all right," and the only way the employees could get something from the Company. Although Gunter testified that he could not recall this conversation, he did not deny it. I credit Ewings.

B. *The Discharges of White and Ewings—The Incident of July 15*

1. Summary of the evidence

a. *The "fight"*

White and Ewings were discharged as the result of an incident which took place on July 15. There are four versions of this event. According to Ewings, he walked into the breakroom and asked employee Terry Lee Johnson to cut some material for him. Ewings was carrying his claw hammer, since he did not have his "hammer holder." Johnson first said that he would cut it when he got time, but then began to walk out of the room to comply with the request. Ewings turned to speak to Johnson, and, as he did so, White came up behind Ewings and "goosed [him] in the side." Ewings "just jumped" in response to White's action, and his hammer hit White's lip. The latter protested, and Ewings said that he was sorry. White said that he was going to get a bandage to put on his lip.

White corroborated Ewings' version of the matter. He was merely teasing Ewings when he "goosed" him, which the employees do all the time. Ewings "Really jumped," Raised his arms, and the hammer caused a "little cut" on White's lip. Howell described the injury as a cut rather than a bruise. White said he was going to the office to report it, "because they tell you if you get hurt any kind of way to report it."

Employee Willie Byrd, a witness called by Respondent, gave an entirely different version of the incident. He and White were sitting in the breakroom, and Ewings was sitting by the door. Ewings told Johnson that he would give him 10 minutes to cut the material, or Ewings would "report" Johnson. White then asked Byrd whether the latter thought that Johnson was going to cut the material, and Byrd replied that he believed Johnson would do it only when he was ready. Ewings then turned to White and said that he was always interfering when Ewings was talking. White stated that he was "through," and got up to leave. Ewings stepped in front of White, and the latter "swung" at Ewings, although Byrd said he did not know whether the blow landed. White then fell to the floor, and Byrd assumed that Ewings hit White in the mouth with a hammer, although he did not actually see this. White then went upstairs to talk to Howell, returned, and asked Ewings whether he wanted to go "outside and finish what he had started." Byrd and another employee then "held" White to keep him from going "outside."

White denied saying anything to Byrd or Johnson. He also denied saying anything about how long it would take Johnson to cut some wood, and denied that Ewings told him it was "none of his business." Further, he did not "swing" at Ewings. In similar manner, Ewings denied the essential elements of Byrd's testimony. Johnson testified that he told Ewings he would comply with the latter's request after the break, but then left during the break. White was not in the breakroom during this conversation, but came into it as Johnson was leaving. Johnson did not hear White say anything.

b. *The "investigation"*

White went to the office, where Howell, Gunter, and Foreman W. D. Payne[4] were present. According to White, he said that he and Ewings had been "messing around" and that Ewings had hit him with a hammer. Howell jumped up and said, "You were fighting, weren't you?" White denied this, and said that he merely wanted to report the injury and get a bandage. Howell, Payne, and Gunter asserted that White said Ewings had hit him, with Gunter stating that White explained he and Ewings "had got into it."

Howell told White to sit down, according to White. "I'm going to find out what happened," he said. "I believe you were fighting." Howell and Payne then left the office, while White remained with Gunter. According to Payne, White arrived in the office during the 10-minute morning break. Payne and Howell then left the office for 10–15 minutes. Gunter confirmed that he stayed with White for 15 minutes in the office.

Payne testified that he and Howell went to the breakroom, where they asked Ewings what had happened. Ewings replied that there was "nothing to it," that they had "pushed or something." Ewings, however, testified

[4] The pleadings establish and I find that Payne was a supervisor within the meaning of Sec. 2(11) of the Act.

that the interview took place in the office, where he denied that he and White had been fighting, but admitted that he had hit White on the lip while they were "playing." Howell agreed that Ewings told him that the two employees had been "playing around."

In contrast to Payne's assertions, Howell's testimony suggests that the first person he questioned was Byrd, whom he saw as the latter was leaving the breakroom. According to Howell, Byrd made essentially the same statements to Howell as were recited in Byrd's testimony described above, including White's alleged interference in a conversation between Ewings and Johnson.

Byrd, on the contrary, asserted that his interview with Howell took place in the office. Byrd returned to his work station, and it was not until 15–30 minutes after the "fight" that he received a call on the intercom from Howell, and went to the office. Although Byrd asserted that he told "the whole story," he could provide few details at the hearing about his report to Howell. Asked whether he said that White invited Ewings to go "outside and settle it," and that he had held White back, Byrd averred that he could not remember. Byrd said that Howell asked employees Lane Williams and Greg Bivens about the matter, but he did not know what they had reported.[5] Byrd testified that he signed a statement at Howell's request, but could not remember what was in it and did not have a copy. The statement was not introduced into evidence.

Howell also said that he spoke to Terry Johnson about the matter. "He [Johnson] told me he had left the break area," Howell testified. Howell elaborated on this in a memo to the files of Ewings and White, in which he wrote that Johnson stated he had left "before anything happened" (Resp. Exh. 1).

Howell told White and Ewings to leave for the day, and to return the next morning. Although these instructions were given separately, White and Ewings met outside the plant, and had a beer together. "Maybe he didn't understand what we were telling him," Ewings told White. "Let's go back and talk to him again because we need our jobs."

The two employees then returned to the plant at or about 11 a.m., and had Howell paged. He appeared, together with Gunter and Payne. The employees testified that they said they had not been fighting. Howell testified that they contended that it was not "really a fight," but asserted that Ewings admitted putting his hand on White's chest, that White "swung" at him, and that Ewings then hit White with a hammer. According to Gunter, however, the employees "didn't think there was a fight to it," and White did not remember hitting Ewings.

c. *The discharges*

The employees then left and returned the next day, April 16, pursuant to Howell's instruction. Howell discharged them in separate interviews. The separation notices assert that they were terminated for "fighting on Company property during working hours" (Resp. Exhs. 4 and 5). Neither employee had previously engaged in fighting, and neither one had been disciplined. Ewings again tried to tell Howell that they had not been fighting, and Howell replied that he had "made [his] decision." Replied Ewings, "Well, if that's the case, what about Jimmy Kitchens and Larry Wiley?"

"What *about* them?" asked Howell, and Ewings replied that they had been fighting, and that "three people got cut back there." Howell denied that he knew anything about it. "Man," said Ewings, "you're going to sit there and tell me you don't know nothing about this, and I was standing up there looking at you talking to them, looking at the cut, where Larry had got cut, and you don't know nothing about that?" Howell "just turned off and walked away," according to Ewings' uncontradicted testimony. Howell corroborated Ewings' testimony about this aspect of the exit interview.

The discharges took place 1 week prior to a Board election scheduled for July 23, and the Union was thereafter certified as the collective-bargaining representative of Respondent's production and maintenance employees. Howell asserted that he did not know White and Ewings supported the Union, at the time of their discharge.

2. Factual analysis

Byrd's testimony about the "fight" is inconclusive taken at face value, because he admits that he never saw Ewings hit White with a hammer, but merely assumed that Ewings had done so. Although it is clear that Ewings' hammer did hit White, the employees described it as an involuntary reaction to White's "goosing" Ewings, rather than a deliberate blow.

I credit Johnson's testimony that White was not even present in the breakroom during the Ewings-Johnson conversation. Johnson was a current employee, and, as such, his testimony was "apt to be particularly reliable." *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978), enforcement denied on other grounds 607 F.2d 1208 (7th Cir. 1979). White's absence during this conversation undercuts Byrd's description of the circumstances leading up to the alleged fight, since White was not even present when Ewings was talking to Johnson, he could not have "interfered" with Ewings.

It is highly unlikely that Ewings and White made the statements attributed to them by Howell when they returned to the plant on the morning of April 15, since they returned for the express purpose of clarifying the fact that they were *not* fighting. Also, Gunter's account is different from Howell's.

Respondent's witnesses contradict each other. Since White arrived in the office to report his injury during the 10-minute break, and was retained there for 10–15 minutes according to Payne and Gunter, he could not have returned during the break to invite Ewings "outside," as Byrd contended that he did. Respondent's witnesses give two different locations for Howell's conversation with Byrd about the "fight"—on the way to the breakroom (according to Howell), and in the office after a call on the intercom (according to Byrd). Byrd's inability to remember the details of the statement which he

[5] Williams was called as a witness by counsel for the General Counsel and was thus present in the courtroom, but was not questioned about the alleged White-Ewings fight.

signed for Howell contrasts strangely with his detailed testimony about the same events, and casts further doubt on the latter. I do not credit his testimony about the "fight."

The evidence does not support an inference that Howell reached an objective conclusion based on his "investigation." Other than Byrd, the only other employees that he consulted were Johnson, Williams, and Bivens. However, according to Howell himself, Johnson told him that he left the breakroom before anything happened. This put Howell on notice that no credence could be given to Byrd's explanation of the circumstances leading up to the "fight"—if, indeed, Byrd gave Howell the same version which he presented on the witness stand. Although Byrd signed a statement, it was not submitted by Respondent. Although Howell talked to Williams about the matter during his "investigation," Respondent did not question him about the subject during the hearing, despite his presence in the hearing room. Finally, Howell's statement to White when the latter first went to the office that he thought the two employees had been fighting, in the face of White's denial, suggests that Howell had made his decision prior to any investigation.

The preponderance of the credible evidence thus shows that Ewings accidentally cut White's mouth with a hammer while the two employees were engaged in horseplay, but were not fighting. Although Respondent purported to investigate the matter, it did not do so impartially, and discharged the two employees the following day, April 16, for the asserted reason that they were fighting, without objective evidence in support of this assertion.

C. *Respondent's Policy on Fighting in the Plant*

1. Evidence concerning fighting

The parties submitted evidence on company policy toward employee fighting in the plant. Thus, Donald Ray Williams, a former company employee, testified that another employee, Ira Jackson, pushed him up against a machine when Williams refused to cut some lumber for Jackson prior to other work requests which had priority. Although the date of this event is not clear, it appears to have taken place in 1977. A leadman called Production Manager Larry Cooper,[6] who then directed Williams and Jackson to the office, where they had a conversation with Plant Manager Loomis Collier[7] in the presence of Cooper. Collier said that the Company would not permit fighting in the plant. Williams denied fighting, but Jackson admitted pushing Williams. Collier said that he would not allow "this horseplaying around," and that the next incident would result in discharge. Neither employee was otherwise disciplined. I credit Williams' uncontradicted testimony.

[6] The parties stipulated that Cooper was production manager in 1981 and that he was excluded from the bargaining unit as a supervisor during the election. L. C. Walker, a former employee, testified without contradiction that Cooper held the same position in 1977. I find that Cooper was a supervisor within the meaning of Sec. 2(11) of the Act in 1977.

[7] Williams testified without contradiction that Collier was the plant manager at that time.

In April 1981, a fight took place between employees Larry Wiley and Jimmy Kitchens. Kitchens pulled out a razor knife, whereupon Wiley picked him up in the air and threw him at leadman James Dupree, who was trying to intervene. With Kitchens on the floor, Wiley attempted to hit him, but was restrained by employee Willie Stewart. Wiley then armed himself with a knife and a hammer, and the fight resumed. Another employee, Alvin Clay, was also involved in the fight. Three employees sustained knife wounds—Wiley a laceration type wound in the abdomen, Stewart on one of his arms, and Clay on one of his legs.[8]

Dupree, unable to stop the fight, called Foreman Payne on the "intercom system." Wiley testified that Dupree told Payne there was trouble in the plant. Wiley's testimony was partially corroborated by Dupree and other witnesses. Payne, however, denied that he was informed about the fight in this manner, although he admitted that there was an intercom outlet in the area where he was working. Instead, Payne asserted that someone whose name he could not recall came to the office and told him that there was fighting in the floor department. I credit Wiley's corroborated testimony on this point.

Payne and Plant Superintendent Howell went to the plant to investigate.[9] According to Wiley, the fight stopped about 3 or 4 minutes before Payne arrived. Lane Williams declared that the supervisors arrived 2-3 minutes after the fight. Dupree testified that "things cooled off a little" when the combatants heard him calling Payne, and that the latter arrived 1 or 2 minutes after the fight had stopped. It is clear that Payne arrived at the scene a few minutes after the end of hostilities.

Wiley testified that none of the employees had returned to his work station by the time of Payne's arrival. Payne and Dupree, however, asserted the contrary. Given the extent of the melee, the fact that three of the employees had sustained knife wounds, and the few minutes intervening between the end of the fight and Payne's arrival on the scene, it is unlikely that the employees would have placidly returned to work in so brief a time I credit Wiley's testimony and find that the employees were standing around without working at the time of Payne's arrival.

Wiley testified that Payne and Howell asked him why he was fighting Kitchens, since it was Kitchens who got Wiley his job. Ewings, who was on a scaffold, saw Wiley showing his wound to the supervisors. Payne sent Wiley to the maintenance room for treatment. Stewart testified that the two supervisors asked him what had happened. He replied that there had been a fight, and that he went over to break it up. Stewart was wearing a short-sleeve shirt, and Howell saw his injury. Like

[8] The fact that the fight took place is established beyond any doubt by the testimonies of numerous witnesses, including leadman James Dupree, a witness for Respondent. Although company counsel contended that Dupree was a hostile witness, this was not established. In addition, the scars of Wiley and Stewart resulting from their wounds were shown during the hearing.

[9] The evidence is conflicting on whether both arrived at the same time, or Howell a few minutes later. I do not consider it necessary to resolve this conflict.

Wiley, Stewart was sent to the maintenance room for treatment.

The company officials, however, denied that there was any evidence of a fight. There were no wounds, no blood, and nothing to indicate the fracas which actually took place. Payne asserted that he asked Wiley, Dupree, Kitchens, Clay, Stewart, and Lane Williams whether there had been a fight, and that each replied in the negative. Howell asserted that he received similar denials. As noted, this testimony is contradicted by Wiley, Stewart, and Ewings. In addition, Lane Williams and leadman Dupree denied that anybody asked them about the events.

Payne's and Howell's assertions are incredible in light of the magnitude of the battle which actually took place, the fact that deadly weapons were involved, that three employees were wounded, the fact that the supervisors were contradicted by the believable testimonies of their employees, and the visible evidence of employee scars.[10]

Although Dupree placed Wiley in a different work area for a few days after the fight, neither Kitchens nor Wiley was disciplined. The latter was a probationary employee, having been hired about 3 weeks before the fight, according to his credible testimony. He was on layoff at the time of the hearing.

I conclude that the Company investigated and found out that the fight had occurred, but did not discipline any of the employees.

Howell testified that company records showed that three employees—Bill Byrd, L. C. Williams, and George Baker, or Barker—had previously been terminated for fighting. However, Howell had no personal knowledge of these events, and said that he found the company records to be in "disarray." The records themselves were not introduced into evidence. Also according to Howell, they show that an additional reason for Baker's, or Barker's discharge was his failure to get along with a supervisor, and that he had previously been warned.

The "Bill Byrd" referred to by Howell was Willie Byrd, a witness in the instant proceeding. He testified that he was discharged for fighting in 1977 or 1978. Production Manager Larry Cooper actually saw the fight and discharged Byrd and another employee, according to Byrd. However, Byrd was rehired about a year later by a new production manager, Joe Coley.

2. Company rules

Respondent introduced a document purporting to contain the plant rules, one of which states that fighting will subject employees to disciplinary action (Resp. Exh. 3). Howell testified on direct examination that the rules were in effect in the spring of 1981. On cross-examination he asserted that they had been posted on the bulletin board, but then admitted that he had made contrary statements in his pretrial affidavit. Finally, Howell conceded that the rules had not been posted "at this particular time that we're talking about." White and Ewings both denied seeing any plant rules governing employee conduct. I find that Respondent either had no written rules pertaining to employee conduct at the time of Ewings' and White's discharges or, if it did, it had not communicated these rules to its employees.

3. Factual analysis

Howell's testimony based on company records which were never introduced into evidence, concerning events about which Howell had no personal knowledge, has little probative value. Byrd was not a trustworthy witness on the details of the Ewings-White episode compared with other witnesses. There is no comparable, independent method of testing the reliability of his testimony concerning his own discharge. However, taking his statements at face value, one company supervisor discharged an employee for fighting, and another supervisor rehired him without any evidence that the circumstances of the discharge had been reassessed. At most this suggests that company policy on fighting was erratic and depended on the identity of the supervisor, or on other unknown factors. Howell's and Byrd's testimonies are therefore questionable evidence on which to base a determination of Respondent's actual policy.

Of greater probative weight is Respondent's reaction to the Williams-Jackson scuffle and the Wiley-Kitchens battle, the latter in particular. It took place only a short time before the discharges of Ewings and White, and involved numerous participants, deadly weapons, and three wounded employees. The fact that none of the combatants—one a probationary employee was given even minor discipline provides a glaring contrast to the harsh discipline meted out to Ewings and White for an incident which they insisted was only horseplay, and which was a first offense for both of them.

Considering this disparity of treatment together with the fact that Respondent had no published rules on employee conduct, I conclude that it had no definite policy on employee fighting in the plant, and that it had condoned such conduct in the past.

D. *The Alleged Threat of Discharge*

Wiley testified that, on the day Ewings and White were discharged, Payne told Wiley and Kitchens to forget *their* fight, and not to tell anybody about it. Further according to Wiley, after the filing of the charge herein, and the arrival of a Board investigator at the plant, Payne told Wiley and Kitchens not to say anything about their fight if they wanted their jobs. Kitchens replied to Payne (according to Wiley): "If you fire us, you've got to fire everybody that's fought in the plant." "Do you understand?" Payne responded. Employee Lane Williams testified that, on the day the Board investigator came to the plant, he observed Payne draw Wiley and Kitchens aside and say something to them. Wiley later came to Williams and told him not to say

[10] Emory J. Raby, a witness for Respondent, stated that he was the maintenance man at the time, and was in charge of first aid administration. He testified that Wiley came to him in the spring of 1981 with a cut on his abdomen. According to Raby, Wiley said that he sustained the injury on a piece of company equipment. On the same day after treating Wiley, Raby heard that there had been a fight between Wiley and Kitchens. Although Raby's assertions as to what Wiley told him are uncontradicted, they are insufficient to offset the substantial, corroborated evidence which establishes that Wiley was injured in a fight with Kitchens.

Kitchens did not testify because he was in the U.S. Navy at the time of the hearing.

anything about the Wiley-Kitchens fight, if Williams wanted to keep his job. Payne denied the statements attributed to him by Wiley.

I credit Wiley's testimony. Although on layoff, he was still an employee of the Company, while Williams was working at Respondent's plant at the time of his testimony. *Gold Standard Enterprises, supra.* Accordingly, I find that Foreman Payne told Wiley and Kitchens, on the day a Board investigator arrived at the plant, not to say anything about their fight if they wanted (to keep) their jobs.

E. *Legal Analysis and Conclusions*

1. The alleged independent violations of Section 8(a)(1)

a. *Alleged unlawful surveillance*

The credited testimony establishes that Company Supervisor Howell and a salesman drove up and down a street during the evening near a lounge where, Howell knew, a union meeting was taking place. Howell parked his car near another lounge across the street, in full view of employees going to the meeting, and engaged some of them in conversation. Howell's asserted explanation of his actions was that he and the salesman were driving around town, drinking in the car. Both lounges were located in a black entertainment district, and the lounge where Howell parked was closed that evening. Howell, who is white, does not frequent that lounge when it is open.

It is clear that Howell was observing the union activities of Respondent's employees, and the General Counsel has therefore established a *prima facie* case of surveillance. The burden shifts to Respondent to provide an explanation for Howell's presence near the meeting. *Danville Nursing Home*, 254 NLRB 907, 911 (1981). This burden may be met by a showing, for example, that the supervisor customarily engaged in such activity, *Cumberland Farms Dairy of New York*, 258 NLRB 900, 95 (1981), or that his presence near the union meeting was mere coincidence, *Mangurian's Inc.*, 227 NLRB 113, 114 (1976), enfd. 566 F.2d 463 (4th Cir. 1978). If, however, the supervisor's presence near the protected activity was "highly unusual" and beyond any legitimate needs of the employer, his conduct would constitute unlawful surveillance. *Arrow Automotive Industries*, 258 NLRB 860 (1981). Put in other Board language, if the supervisor's action was "not an ordinary occurrence," this fact would tend to show that the employer "went out of its way to observe the union activities of its employees, with the resulting inhibitory effect on their organizing attempts." *L. Tweel Importing Co.*, 219 NLRB 666, 667 (1975).

I conclude that Respondent has not satisfactorily explained Howell's presence across the street from the union meeting. It is obvious, of course, that his going around town drinking in an automobile had nothing to do with company business. Moreover, considering the matter as merely recreational activity, Howell's explanation is still unpersuasive. What did driving up and down the street before a union meeting have to do with his professed bibulous inclinations? And why did he stop and park near a closed lounge in a black district which he does not normally frequent? His conduct was "highly unusual" and "not an ordinary occurrence."

Howell's protestations that he made no attempt to conceal himself when parked near a union meeting are irrelevant, since "[a]ny real surveillance by the employer over the Union activities of employees, whether frankly open or carefully concealed, falls under the prohibitions of the Act."*NLRB v. Collins & Aikman Corp.*, 146 F.2d 454 (4th Cir. 1944), enfg. 55 NLRB 735. Since Respondent has thus failed to meet its burden of explaining Howell's presence near a union meeting, I find that it has engaged in unlawful surveillance of the union activities of its employees in violation of Section 8(a)(1) of the Act.

b. *The alleged unlawful threat of discharge*

As indicated above, on the day a Board investigator arrived at the plant to investigate the charge herein, Foreman Payne told Wiley and Kitchens not to say anything about their fight if they wanted their jobs. This was an obvious threat to fire the employees if they gave evidence about their fight to the Board agent. Respondent's objective was equally obvious—since it was basing its discharge of Ewings and White on an alleged fight, it wished to prevent the Board from acquiring knowledge of the Wiley-Kitchens fight, and the absence of disciplinary action thereafter. Such threats are violative of the Act under established law. See, e.g., *Art Steel of California*, 256 NLRB 816, 821–822 (1981), and authorities cited therein. Accordingly, by such conduct on the part of Foreman Payne, I find that Respondent violated Section 8(a)(1) of the Act.

c. *The alleged unlawful interrogation*

As shown above, during Howell's surveillance of the union meeting, he engaged White in conversation, and asked him what he thought about the Union. Foreman Gunter asked the same question of Ewings, about a week before the latter's discharge. The Board has recently concluded that "inquiries of this nature constitute probing into employees' union sentiments which . . . tend to coerce employees in the exercise of their Section 7 rights . . . . The type of questioning at issue conveys an employer's displeasure with employees' union activity and thereby discourages such activity in the future." *PPG Industries*, 251 NLRB 1146, 1147 (1981).[11]

Both Ewings and White openly supported the Union.[12] This fact, however, does not negate the illegality of the questions directed to them by Howell and Gunter. *PPG Industries, id.* I find, accordingly, that Respondent, by Howell's and Gunter's aforesaid questions to White and Ewings, thereby engaged in coercive interrogation violative of Section 8(a)(1) of the Act.

[11] See also *Gossen Co.*, 254 NLRB 339 (1981).

[12] Howell's assertion that he did not know that Ewings and White favored the Union, at the time he discharged them is incredible for the reasons hereinafter set forth.

2. The alleged violation of Section 8(a)(3)

White and Ewings were active supporters of the Union, a fact which was well known to Respondent. White told Howell during the latter's surveillance of the union meeting that the Union was "one of the best things we could do." Company supervisors saw White distributing union leaflets, and White publicly challenged Company President Hutcheson on the merits of unionism. Ewings was similarly open about his union sympathies, and even tried to give a union leaflet to Howell. When Gunter asked Ewings what he thought about the Union, the latter replied that it was the only way the employees could get something from the Company. In the face of these indisputable facts, Howell's assertion that he was unaware of the employees' prounion sentiments, at the time he discharged them, is unbelievable.

Under established Board law, an inference that the discharges were discriminatorily motivated is warranted by the employees' union activism, the fact that this was known by Respondent, the disparity in treatment of other employees who had actually engaged in fighting, the fact that a Board election was imminent, and on the basis of the Company's animus against the Union manifested by its other unfair labor practices.

The General Counsel has thus made a strong *prima facie* showing that White's and Ewings' protected activities were motivating factors in Respondent's decision to discharge them. And, for the reasons explicated above, Respondent has not shown that they would have been discharged even in the absence of their protected activities. Since Respondent failed to discipline Wiley and Kitchens after their battle, it obviously would have ignored the comparatively minor incident involving White and Ewings under normal circumstances. The only different circumstance was the fact that White and Ewings were known union adherents, and that a Board election was scheduled to take place a week after the discharges. Accordingly, I conclude that Respondent discharged White and Ewings because of their union activities, in violation of Section 8(a)(3) of the Act. *Wright Line*, 251 NLRB 1083 (1980).

In accordance with my findings above, I make the following:

CONCLUSIONS OF LAW

1. Brigadier Industries is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act:

(a) Surveillance of its employees' union activities.

(b) Threatening employees with loss of their jobs if they gave evidence to an agent of the Board.

(c) Coercively interrogating employees concerning their union sympathies.

4. By discharging Wenford B. Ewings and Sammy L. White on April 16, 1981, because of their union activities, Respondent thereby violated Section 8(a)(3) and (1) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes of the Act.

It having been found that Respondent unlawfully discharged Wenford B. Ewings and Sammy L. White on April 16, 1981, it is recommended that Respondent be ordered to offer each of them immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing if necessary any employee hired to fill said position, and to make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct, by paying him a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[13] In addition, it is recommended that Respondent be required to expunge from its personnel records all references to its unlawful discharges of White and Ewings, and to notify them in writing that this action has been taken and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

I shall also recommend that Respondent be required to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I recommend the following:

ORDER[14]

The Respondent, Brigadier Industries, Sylvester, Georgia, its officers agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in surveillance of its employes' union activities.

(b) Threatening employees with loss of their jobs if they give evidence to an agent of the National Labor Relations Board.

(c) Coercively interrogating employees concerning their union sympathies.

(d) In any other like or related manner interfering with, restraining, or coercing employees in the exercise

[13] See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

of their rights under Section 7 of the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Offer Wenford B. Ewings and Sammy L. White immediate and full reinstatement to their former positions, or, if either such position no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, discharging if necessary any employee hired to replace either of them, and make them whole for any loss of earnings either of them may have suffered by reason of Respondent's discrimination against him, in the manner described in the section of this Decision entitled "The Remedy."

(b) Expunge from its personnel records, or other files, of Wenford B. Ewings and Sammy L. White, any references to their unlawful discharges and notify them in writing that this action has been taken and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities at Sylvester, Georgia, copies of the attached notice marked "Appendix A."[15] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."